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MEANS AND ENDS IN POLITICS AND LAW: AN ESSAY IN HONOR OF CASS SUNSTEIN

Richard H. Pildes*

In both constitutional law and public policy, Cass Sunstein's work has entailed a search for the largest common denominator that justifies government action. In constitutional theory, Sunstein developed the concept of "incompletely theorized agreements" as a model for how judges ought to decide cases.¹ On this view, judges should avoid larger issues of principle or theory not essential to the resolution of a particular case and instead seek minimal, narrow grounds for their decisions that elicit among the judges the greatest "overlapping consensus."² Among the justifications for this approach, Sunstein argued that judges should resolve legal conflicts in a way that expresses the "high[est] degree of mutual respect"³ for opposing views, that fosters ongoing reciprocity among those involved in legal conflict, and that prescinds from challenges to deeper matters of value, principle, or theory not crucial to resolving the conflict at hand.⁴ Judges might inevitably have to resolve disputes, but they should do so in a way that nudges law forward in minimal steps that will foster the greatest consensus and the least divisiveness.

With respect to his vision of public policy, Sunstein's work has reflected a similar commitment to maximizing consensus and reducing conflict. Though this similarity of structure between Sunstein's constitutional and public policy scholarship might not be immediately obvious, this connection emerges in Sunstein's search for a "third way" in policymaking that borrows the best of both Franklin Roosevelt's New Deal liberalism and Ronald Reagan's conservative critique of the New Deal. Searching for an overlapping consensus in the realm of policy, Sunstein has sought to chart a course that would cut through the recent polarization of politics and that should, in his view, provide a political vision and agenda capable of attracting broad, consensual support.

Sunstein's vision of minimalist constitutional adjudication has been analyzed and debated in much depth already, but his vision of minimalist public policymaking has not. In this tribute to his work, I want to bring out the structure of his approach to public policymaking, a structure that has emerged most clearly as he has drawn together the

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1. See generally Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 Harv. L. Rev. 1733 (1995).

2. *Id.* at 1734 (citing John Rawls, *Political Liberalism* 133 (Colum. U. Press 1993)).

3. *Id.* at 1735.

4. *Id.*

threads of earlier work into a recent, major statement of his vision for policy. Knowing how intellectually curious and wonderfully relentless Sunstein is in constantly pushing his work forward, I then want to raise some questions about the plausibility of this vision and expose some of the assumptions on which I believe that vision must be based.

I.

Among Sunstein's myriad interests has been the effort to incorporate into policy a realistic understanding of human decisionmaking and behavior. If we are to understand the consequences of legal rules or public policies, we must have insight into how people are likely to respond. As in so many other areas, Sunstein was among the first to bring the insights of behavioral law and economics ("BLE") into legal literature.⁵ Offered as a corrective to conventional economics, which assumed a certain kind of rationality to human behavior that was easy to model but hard to swallow as realistic in various contexts, BLE claimed to provide a more truthful account of individual decisionmaking and action.

BLE generated and drew upon many fascinating studies of individual decisionmaking. Sunstein contributed a great deal to this work.⁶ However, despite all the interest BLE spawned, the implications of this work for policy have been uncertain. In order for the departures from formal rationality in individual decisionmaking that BLE revealed to be made the basis for policy, there have to be reasons to believe that BLE reveals patterns that will hold for large numbers of individuals in a consistent, predictable, and generalizable way. Moreover, those patterns would have to persist under forces generated by repeated interaction in the context of actual social institutions, such as the market. And even once we had confidence that certain general patterns of individual choice could be reliably predicted, the ways public policy might be modified accordingly were not always clear. To simplify this point, if individual decisionmaking is so fluid that it changes constantly depending on how people perceive the context of choice, what implications, if any, are there for how public policy ought to be designed? For these and other reasons, while BLE remained an energetic, intellectually intriguing field of study and while there were a few direct implications for policy in certain limited areas, the question of whether a more realistic understanding of human behavior could contribute in a major way to public policy and what legal academics might have to offer in advancing that contribution remained open.

In his most mature work on these issues, Sunstein takes BLE to new heights. His recent book, *Nudge: Improving Decisions about Health, Wealth, and Happiness*, co-authored with Richard H. Thaler, is one of Sunstein's most important contributions to public policy.⁷ The book teems with concrete suggestions for how government might

5. *Behavioral Law and Economics* 1 (Cass R. Sunstein ed., Cambridge U. Press 2000) (discussing how human behavior can have an effect on the interpretation and analysis of law); Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 Stan. L. Rev. 1471 (1998) (discussing how legal and economic analysis can be improved by studying human behavior and decisionmaking processes).

6. See generally e.g. Cass R. Sunstein, *Worst-Case Scenarios* (Harv. U. Press 2007); Cass R. Sunstein, *Laws of Fear: Beyond the Precautionary Principle* (Cambridge U. Press 2005).

7. Richard H. Thaler & Cass R. Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness* (Yale U. Press 2008). <http://digitalcommons.ilw.edu/tulsa/vol43/iss4/art3> will use "Sunstein" as shorthand to refer to

improve policy outcomes by taking into account BLE findings on how individuals actually make choices. These suggestions range from areas such as environmental protection, charitable contributions, health care, social security, tax filing, smoking, savings programs, investing, and many others. Many of these suggestions are not offered as abstract speculations but as well-justified ideas anchored in empirical studies. Often, Sunstein documents how small changes in the way choices are presented to people (“framed”) can lead to better outcomes for public policy. But beyond all the specific proposals, Sunstein argues that BLE can and should be the foundation for a new, overlapping consensus about government that provides a blueprint for a twenty-first century vision of the state.⁸

In keeping with this search for consensus on the role of the state, Sunstein attaches the label “libertarian paternalism” to his vision.⁹ This oxymoronic-sounding label reflects Sunstein’s self-expressed “hope that conservatives, moderates, liberals, self-identified libertarians, and many others” will be able to endorse the underlying political conception.¹⁰ As in all his work, Sunstein is seeking a conception that elicits a wide (but not deep) consensus, in this case, for the context of politics writ large. The terms in which Sunstein expresses this political vision, libertarian paternalism, have drawn criticism, on the ground that paternalism and libertarianism are fundamentally at odds with each other, but I do not care about the semantics or whether some other label might be more fitting. The label does reflect Sunstein’s aspiration to transcend conventional politics and categories of political conflict. My interest is in the substance of that vision and the assumptions embodied within it, regardless of the particular terms used to brand that vision.

II.

Two ways of seeing Sunstein’s political vision exist. The first is the way in which Sunstein presents it: as a profound new alternative capable of transforming current politics and transcending political polarization and conflict. Sunstein himself calls his vision “a real Third Way—one that can break through some of the least tractable debates in contemporary democracies.”¹¹ He rightly notes that “[t]he twentieth century was pervaded by a great deal of artificial talk about the possibility of a ‘Third Way’” in politics.¹² But Sunstein means his “real” Third Way to be the true missing link in an evolution of politics that moves past conventional liberal-conservative divides.¹³

Indeed, Sunstein considers his post-partisan conception an attempted synthesis of Franklin Delano Roosevelt’s New Deal liberalism and Ronald Reagan’s new conservatism (a particularly daunting task in light of Reagan’s statement of philosophy in his first inaugural address, which “outlined the coming of a new order that would

both authors, on the assumption (and hope) that Richard Thaler will never read this essay.

8. *Id.*

9. *Id.* at 4–6.

10. *Id.* at 248.

11. *Id.* at 252.

12. Thaler & Sunstein, *supra* n. 7, at 252.

13. *Id.* at 252–53.

break completely with the New Deal and the ‘modern Republicanism’ that accepted the New Deal’s premises”).¹⁴ Consistent with the New Deal, Sunstein strongly defends the need for government intervention in market ordering and proclaims “senseless” general opposition to government intervention per se.¹⁵ Consistent with the Reagan vision, Sunstein also defends the importance of freedom of choice, with the strong preference such choice entails for market ordering. Sunstein’s synthesis is to defend justifiable government intervention, but to require that intervention to be structured in ways that promote freedom of choice.¹⁶

The second way of seeing Sunstein’s conception is almost diametrically opposite to the way Sunstein envisions it. Perhaps this conception actually reveals how chastened and minimalist political aspirations are in our era. Rather than a bold, new Third Way for a transformed politics, Sunstein’s search for consensus might show that political ambition and aspiration at this moment can only be confined to the lowest common denominator of broad political acceptance. Perhaps this is a matter of political realism: anything more than a modest politics of incrementalism is simply not likely to be enacted. Or perhaps this constrained vision reflects a dispirited post-New Deal liberalism that, after seeing the failures of many liberal programs, finds it difficult to imagine bold, new political programs. But when we move from rhetoric to detail, as I will show in a moment, it becomes clear that Sunstein’s approach entails tinkering with the details of various programs, rather than the bold new departures of either the New Deal or the Reagan vision. To be sure, I do not mean to belittle this tinkering; the health, welfare, and safety of many Americans might well be improved by the changes Sunstein urges. But it is nonetheless important to put this political program in perspective and to use it to raise questions about the political era in which we live and the kind of politics to which we can and should aspire.

The centerpieces of Sunstein’s political vision are default rules and information disclosure. Because BLE has revealed the remarkable extent to which people’s choices are influenced by the baseline from which they start, Sunstein advocates that government power be used in various contexts to set these baselines in terms that will influence people (but not mandate them) to make the choices that are in their own long-term interests. Among the best examples, because the most well-grounded empirically, are those involving retirement savings plans. Thus, when employees must opt in to employer-sponsored savings plans, the participation rate is 20% after three months and 65% after thirty-six months; but when employees are automatically enrolled and must opt out of the plan, the participation rate leaps to 90% immediately and 98% within thirty-six months.¹⁷ By changing the default rule and requiring automatic enrollment plans with opt-out options, government can therefore dramatically increase private savings rates. If increased savings rates promote people’s long-term well-being—and for

14. Sean Wilentz, *The Age of Reagan: A History, 1974–2008* 127–28 (Harper Collins 2008).

15. Thaler & Sunstein, *supra* n. 7, at 253.

16. *Id.*

17. *Id.* at 109. Sunstein here relies on Brigitte C. Madrian & Dennis F. Shea, *The Power of Suggestion: Inertia in 401(k) Participation and Savings Behavior*, 116 Q.J. of Econ. 1149 (2001) (analyzing “the impact of automatic enrollment on 401(k) savings behavior”).

most people in the United States, they do—then by changing the default rule, government has improved people's lives without mandating any particular choice on them. Once we recognize the power of default rules, we can imagine all sorts of contexts—organ donations, charitable contributions, investment programs, means of privatizing social security—in which government could “nudge” citizens in the right direction simply by changing the default or starting point against which various choices are framed.

Similarly, Sunstein argues that government of the twenty-first century ought to focus significantly on requiring full disclosure of relevant information, in appropriate forms, rather than on regulating outcomes.¹⁸ The key innovation here is not the concept of information disclosure per se; for many years, policy analysts across the spectrum have found common ground in supporting transparency and information-disclosure regimes. In the hotly contested arena of campaign-finance regulation, for example, where passionate advocates can agree on little else, the one form of regulation on which there is widespread agreement is the need for full, timely disclosure of large campaign contributions.¹⁹ The key innovation is the recognition that it is not disclosure per se that is important but the way in which disclosed information is presented to those facing choices, such as consumers. BLE has also taught that, to effectively influence choice, information must be presented in ways that make it likely the information will actually register in meaningful ways.

Shaping information-disclosure regimes so that they mesh effectively with what we know of the modes citizens use to process information has long been a focus of Sunstein's. More than a decade ago, we wrote an article in which we argued that information about health, safety, and environmental risks has to be presented to citizens in ways consistent with what studies showed about effective and ineffective ways to present risk information.²⁰ Similarly, Sunstein shows in *Nudge* how, in many domains of important policy concern—health care and reduction of energy use being particularly momentous examples—government efforts not just to provide consumers more information, but also to present that information in effective ways, could make significant contributions to improved individual decisionmaking and, hence, to important goals of desirable public policy.²¹

But with default rules and information disclosure being the centerpieces of Sunstein's vision of modern government, it becomes clear that this is a vision focused on changing the *means* by which government acts. This focus, however, then raises the question: how much can, or should, politics focus primarily on the means of government action, rather than what ends government ought to pursue? Or, to put the question in terms of Sunstein's own stated ambitions: can it really be the case that the major political critique of the New Deal effectively launched in the Reagan years was simply a critique

18. See Thaler & Sunstein, *supra* n. 7, at 253 (arguing that government intervention should take the form of promoting freedom of choice, rather than of mandated outcomes).

19. See e.g. *McConnell v. Fed. Election Commn.*, 540 U.S. 93 (2003) (unanimously upholding disclosure provisions while dividing over other provisions).

20. Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. Chi. L. Rev. 1 (1995).

21. See generally Thaler & Sunstein, *supra* n. 7.

about the means of public policy, as opposed to the proper role of the state and the ends for which government ought to act? Should we see Democrats and Republicans, liberals and conservatives, as so divisively polarized today merely because they disagree about what means government ought to use in pursuing policy objectives—objectives that, we are presumably to believe, all sides actually share?

I am also skeptical that “information disclosure” can be a cure-all panacea in those contexts in which government needs to act. Indeed, this emphasis on informed choice and full information strikes me as evidence for just how chastened ambitions for public policymaking are in the consensual vision Sunstein offers, or how defensive some policy analysts have become about a conception of government’s role. Take the subprime lending crisis, for example. This is one of many contexts in which Sunstein argues that a Third Way in policymaking would avoid government mandates and would instead focus on ensuring that consumers receive full information in more effective ways. Thus, Sunstein rightly notes that the Truth in Lending Act originally made comparison shopping among mortgages easier because that Act required all lenders to report interest rates in the same, standardized way (through the annual percentage rate, or APR).²² That regulatory structure was well suited, Sunstein argues, to the conventional mortgages (30 year, fixed rate) of the era in which the Act was enacted.²³

But today’s mortgage market has become far more complex, with creative lenders designing a variety of differently structured loans, including variable rate and subprime loans.²⁴ Sunstein argues this creativity is all to the good, since it gives consumers more options. But the solution to the crisis that has resulted from the massive numbers of defaults and foreclosures, as well as failures of financial institutions that have followed in the wake of these new lending practices is, in Sunstein’s view, for government to require better disclosure of the terms of the loans that have precipitated the current turmoil. As he puts it, instead of more aggressive, direct regulation of credit markets, he “prefer[s] an improvement in choice architecture that will help people make better choices” and thus avoid assuming bad loans.²⁵ Government action is needed, but it should take the form of mandating more effective disclosure of what are the effective financial consequences of these more complexly structured loans.

But better information disclosure hardly seems an adequate, or even an effective, response to the most dramatic financial crisis the U.S. has faced since the Great Depression. One way to make the point is that information disclosure focuses only on the demand side for these forms of credit. It does not explain the supply side: what aspects of the regulatory and incentive structure led financial institutions and financial markets more generally to supply these new forms of credit when the consequence of doing so has been the self-destruction of many of these institutions and massive damage to the American economy as a whole?

In the wake of the Depression, Congress created many of the institutions and regulatory regimes that have since given stability and credibility to U.S. financial

22. *Id.* at 137.

23. *See id.*

24. *Id.* at 136–37 (discussing subprime loans).

markets. Some of this regulatory structure focused on better disclosure of information, but much of it involved the kind of command-and-control regulation and mandatory requirements that Sunstein's Third Way aims to avoid. Virtually all high-level policy proposals being considered in the wake of the current crisis recognize that government is going to have to extend this structure to reach financial institutions not covered by the New Deal laws and is going to have to mandate—yes, mandate—restrictions on various kinds of risk-taking practices of financial institutions.

My point is not to criticize this one particular example. Through this striking example, though, I mean to raise a more general question about the seemingly tempting, but at times illusory, appeal of information disclosure as a substitute for more conventional forms of regulation. Information-disclosure regimes are appealing precisely because they are not particularly controversial. Who could be against updating the Truth in Lending Act to ensure that loan information is presented in more effective forms for today's mortgages? But who could realistically believe that differences in the forms borrowers receive would have forestalled the credit-market crisis or would be close to an adequate regulatory approach going forward? Merely because some modes of government action will induce greater consensus should not obscure from us the need, in some of the most important contexts, for more potent government action.

